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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 751.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

AGNES KOSOWATZ, ADMINISTRATRIX OF THE ESTATE OF JOSEPH FRANK KOSOWATZ, DECEASED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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JURISDICTION.

There are no special or important reasons why the Supreme Court of the United States should be burdened with any further proceedings in this matter.

The within action was decided by a jury in the Cuyahoga County, Ohio Common Pleas Court and was reviewed and upheld by the trial court by his overruling of the petitioner's Motion for New Trial. The action of the trial court was unanimously affirmed by the Cuyahoga County Court of Appeals.

The petitioner and respondent each filed briefs in the Supreme Court of Ohio upon the filing of petitioner's Motion for an Order to Certify the Record. After the Ohio Supreme Court heard oral arguments by both the petitioner and the respondent, it overruled petitioner's Motion for an Order to Certify the Record and subsequently denied its application for rehearing.

This proceeding does not present any federal question of substance not heretofore determined by the Supreme Court of the United States, and obviously, the state court did not decide any such question nor decide it in a way not in accord with applicable decisions of this Court. There is no such reviewable question presented as is contemplated by Supreme Court Rule 19.

Jurisdiction is closely related to, if not dependent upon, the questions presented. The type of such questions are such as are described in Rule 28 pertaining to questions certified by the Court of Appeals or by the Court of Claims:

> "* * * Questions of fact can not be certified. Only questions or propositions of law may be certified, and they must be distinct and definite."

QUESTIONS PRESENTED.

The two questions that petitioner claims are presented here are neither of the type that the Supreme Court rules contemplate would be the subject of its review. Normally, under the heading "Questions Presented," the petitioner sets forth one or more questions which call for a declaration of law applicable to a certain set of facts, chiefly for the future guidance of the bench and bar of the United States.

Here the petitioner merely asks, as its questions, that the Supreme Court of the United States decide whether or not the trial court committed error prejudicial to the rights of the petitioner. This means (a) Did the trial court err in the respect or respects complained of? and (b) If the trial court did so err, would there have been a contrary result if such error had not occurred?

In order to determine whether the matters complained of were erroneous would require a review of the entire

trial proceedings. Although petitioner's counsel objected to a portion of the argument, evidence upon which the argument was based was submitted by respondent without objection thereto by petitioner's counsel. Also, to determine whether matters complained of were prejudicial would require the Supreme Court of the United States to weigh the evidence herein.

Question No. 1 pertains to the argument of respondent's counsel. The argument pertained to portions of the evidence that were introduced without any objection thereto at the time of its introduction together with inferences properly deductible therefrom. Strangely, petitioner's complaint with reference to Question No. 1 is principally based upon the photog ıph of a blackboard *which, although contained in petitioner's brief herein, admittedly is not contained in, nor is it a part of the Bill of Exceptions* and it can not be a subject of review. Rather than presenting any legal question, this item is concerned with the exercise by the state trial court of its discretion in the conduct of the trial, particularly in connection with an instance invoked by scurrilous, insulting remarks of petitioner's counsel.

Despite contentions of the petitioner, as indicated by Question No. 2, the record definitely discloses that there was no error,—not even non-prejudicial error—committed by the trial court in its action on the motion of the respondent pertaining to the decedent's adult children.

The petition clearly averred that the only one who was dependent upon the decedent was "* * * Agnes Kosowatz, a widow, who was dependent upon him for her support * * *." The only evidence as to dependency was as to the widow. The petition did describe the next of kin who were, of course, the widow and children.

In accordance with the accepted practice, the names and relationship of the next of kin and heirs at law of the decedent were also set out in the petition.

The Second Cause of Action referred to in so-called Question No. 2 was one to recover for the personal injuries suffered by the decedent during his lifetime. This is in accordance with Title 45, U. S. C., Paragraph 59—"Survival of Right of Action of Person Injured"—which right of action is "for the benefit of the surviving widow or husband and children of such employee." While the amount recovered on the wrongful death action is distributed in Ohio by order of the Probate Court, based upon dependency of the survivor or survivors, distribution of the amount recovered for the conscious pain and suffering, so far as the surviving spouse and children are concerned, is not necessarily controlled by dependency but passes as a part of the estate of the decedent as provided by law.

The evidence was overwhelming that the decedent survived his injuries and suffered for an appreciable period of time so there was no error by the trial court in overruling petitioner's motion to dismiss respondent's second cause of action for conscious pain and suffering.

Neither this case, nor the alleged questions involve principles, the settlement of which are of importance to the public, as distinguished from that of the parties. There is no conflict of opinion or authority between courts of appeals.

The Supreme Court of the United States has reiterated time and again its policy with reference to granting the writ of certiorari.

In 1955, in the case of *Rice vs. Sioux City Memorial Park Cemetery*, U. S. Iowa, 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897, after the writ of certiorari had previously been granted, the court later dismissed it. The syllabus, in part, held:

"* * * The writ of certiorari is dismissed as improvidently granted, since this case is not one in which 'there are special and important reasons' for granting a writ of certiorari as required by Rule 19 of the Rules of this court.

(a) This Court does not sit for the benefit of the particular litigants. (p. 74.)

(b) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. (p. 74.)

(c) This is especially true in cases involving constitutional questions. (p. 74.)

(d) It is very important that this court be consistent in not granting the writ of certiorari except in cases including principles, the settlement of which is of importance to the public as distinguished from that of the parties."

In the above cited case, the Court, in its opinion, stated, at page 74:

"This Court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of particular litigants."

The Court in the above cited case referred to the case of *Layne & Bowler Corporation vs. Western Well Works, Inc.*, 261 U. S. 387 and quoted the words of Mr. Chief Justice Taft, speaking for a unanimous court:

"Certiorari should not be granted except in cases involving principles, the settlement of which is of importance to public, as distinguished from that of parties and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeal."

Another leading case dealing with granting the writ of certiorari is *Magum Co. vs. Coty*, 262 U. S. 159, the syllabus of which in part is as follows:

"§ 2. The jurisdiction to bring up cases from the circuit court of appeals by certiorari was given for the two purposes of securing uniformity of decisions in the circuits and of having questions of importance decided by this court when desirable in the public interest—not for the purpose of giving the defeated party another hearing." (p. 163.)

STATEMENT OF FACTS.

Decedent had been employed by the Nickel Plate Railroad for a great number of years as a mechanic at its Campbell Road yards whose work included the unloading of diesel oil from tank cars, causing it to be pumped into storage tanks. In recent years, storage capacity had been increased from ten thousand to sixty thousand gallons and the staff (R. 273) was cut down from thirteen or fourteen men to seven.

Decedent was required to unload the cars, without a helper, contrary to the usual custom and practice for unloading of such cars in this vicinity. To do this, he was required to go, by ladder, to about the top of a tank car, approximately fifteen to twenty feet above the ground, carrying his tools, a two-inch pipe about sixteen feet long and a large collar, without additional help; to stand upon the metal top of the tank car on a platform with no guard-rails about the dome; to attach the collar to the dome; to insert the pipe into the collar on the dome as shown by the photograph-exhibits; to then bring up another pipe about ten feet long that was on a swivel joint and normally hung loose from a rail about sixteen feet high on the side of a pumphouse in order to connect it with the pipe in the tank car by means of a union. This was required in every operation. Dismantling was done by reversing the process. There was always danger that the pipe and the swivel joint

would swing down by themselves on becoming disengaged or not being held securely.

The facilities provided, and the procedure followed, were contrary to the standard procedure for unloading tank cars and were contrary to the usual customs and practices for doing so. This was due to the fact that these means did not provide a reasonably safe place for the decedent to work, contrary to the standard practices and the usual custom and practice followed for unloading tank cars, which was clearly established by the testimony of A. C. Germaine, a safety engineer, R. 143 to R. 205.

His testimony was not only that the procedure followed and the facilities provided did not provide a safe place for the decedent to work, but that the standard practice was to provide a platform separate and apart from the tank car itself with adequate flooring, runways and railings on which and from which to assemble and disassemble the attachments to the top of the tank car, to provide at least one helper for the man required to do this work upon a tank car that had no platforms and guard rails; to provide arm supports or counterweights so that the pipe on the swivel did not suddenly drop, sway or swing.

He identified plaintiff's Exhibits 17, 18, 19, 21, 22 and 27 as the customary type of installations. He also identified Exhibits 15, 16 and 25 as tank cars containing the fixed type of platform. None of these were provided to the plaintiff's decedent in this case.

Defendant did not offer any testimony to refute plaintiff's testimony that the practices and procedures followed were in accordance with the usual standards, customs and practices.

February 17, 1958 was a day about seven degrees below zero; it was cold and windy and the snow was blow-

ing up. The decedent was found, about 2:15 P. M., lying dead near a tank car which then had been completely unloaded and the swivel pipe swung against the pumphouse; the wrench of the decedent was still on top of the tank car; the collar had rolled off to the side of the tank car; a wrench was lying in some blood near the side of the tank car; there was blood against the upright rail at the rear of the pumphouse; a large pool of blood near the base of the tank car; a path of blood along the ground and on the side of the pumphouse leading into the pumphouse where decedent's blood-covered glasses were found; a bloody path out of the pumphouse where a glove was in front of it and where he was lying on his back, dead, his body frozen stiff. The bloody trail clearly indicated a fall from the unprotected top of the tank car against the upright steel rail and then to the ground. He had staggered about, apparently into the pumphouse where there was a telephone and, finally, with no one around to help him, died from the injuries sustained in the fall; he was last seen about 11:30 A. M. No one went to look for him before he was found dead.

The evidence further established that the platform, near the top of the dome, had protruding, uneven, steel heads about it and was slippery.

Dr. Lester Adelson, the deputy Cuyahoga County Coroner, testified that the decedent had a fracture of the left zygoma, fracture of the nose, a pair of black eyes, lacerations of the nose and chin, scrapes on the forehead and his face was covered with black dirt; there were fractures of the vault, which is the top part of the skull and also the floor of the skull, bruising of the front part of the brain; hemorrhage of the brain and a broken neck.

The injuries were such as would result from a person falling and striking his face against a solid object.

The doctor further testified:

At R. 159:

"The injuries resulted most likely as a result of a fall from a height."

At R. 160:

"He had to fall from an elevation. He couldn't sustain this type and combination and degree of injury merely falling from his own height, in other words, slipping on the ground. He had to be somewhere off the ground."

John Whalen, the relief foreman, testified that when the decedent was on duty (R. 140), he was the only one that unloaded tank cars and while doing so worked high above the ground.

R. 146:

"Q. About 12 feet. Now, sir, the work of unloading tank cars required Joseph Kosowatz to work at elevations higher than his own height, did it not?

A. That's right.

Q. All right, sir. And the only work about the pump house or the tank cars that required him to work at such elevations was on the tank cars themselves, isn't that right?

A. Right."

The evidence was conclusive that decedent was killed when he either fell or was blown from the top of a tank car when he was not provided with a reasonably safe place to work. The evidence disclosed that, at the time of the accident, the defendant's supervisors were aware of what had actually happened.

George Tuttle, the assistant car foreman testified that he was called to make an inspection of the car.

R. 284:

"A. The General Yard Master, Cermak, called by phone and told me to go down to the oil shed, that a man had been *killed down there, fell off a car and was killed*, so I went down and looked at the car."

The jury returned a verdict on the First Cause of Action of the plaintiff's petition, which was for the wrongful death of the decedent, in the amount of Twenty-Five Thousand Dollars ($25,000.00) and on the Second Cause of Action, which was for conscious pain and suffering in the amount of One Thousand Four Hundred Fifty Dollars ($1,450.00).

ARGUMENT.

Not only does petitioner fail to show where this matter involves principles, a settlement of which are of importance to the public as distinguished from that of the parties, or it is a case where there is a real and embarrassing conflict of opinion and authority between Courts of Appeals, but it fails to specifically demonstrate that the matters complained of herein are erroneous and that, but for their occurrence, the jury would have brought back a verdict contrary to that which it did.

There is no contention that the jury did not have ample grounds upon which to return its verdict or that the amount of $25,000 arising out of the wrongful causing of the death of the decedent is excessive or not in accordance with the evidence. Should the writ be allowed, the Supreme Court of the United States would have no pronouncement or enunciation of law to make for the guidance of any of the trial courts in the nation.

Three state courts, including the highest court of the State of Ohio failed to find that there was any prejudice to petitioner resulting from the argument of plaintiff's coun-

sel which, in part, was in response to scurrilous and insulting remarks of petitioner's lawyer.

Counsel for petitioner has attached a picture to its brief. This item, however, is not contained in the Bill of Exceptions and even if it added anything to petitioner's appeal, which it does not, the Court, of course, could not properly consider it.

All of the matter discussed in the argument bearing upon the question of damages was in accordance with the evidence and such reasonable inferences that could be drawn from it. Petitioner has no basis to complain about any portion of the argument.

Certainly the decedent was referred to as a husband and father, the companion and helpmate of his wife. Such were the facts and were developed by the evidence.

Counsel for the petitioner, in his argument, which, of course, followed the first part of the respondent's argument, decided that the way to win this lawsuit, regardless of the facts, was to castigate respondent's counsel and to reflect upon the integrity of both respondent's counsel and witnesses. These tactics instilled a little heat.

Some of petitioner's counsel's arguments are quoted hereafter.

The Mr. Phillips he refers to is a member of the Cleveland Police Department, who was the first officer on the scene following the death of the decedent, being dispatched by the police department radio.

Mr. Germaine is a safety engineer who had followed his profession for forty-five years. He had been President of the American Society of Safety Engineers, member of its organization for over thirty years, had been employed as the Safety Engineer by the United States Steel Corporation and for five and a half years was an enforcement officer of safety practices for the Industrial Commission of

Ohio. The jury found these witnesses to be truthful and honest.

Here is what petitioner's counsel said:

R. 447:

> "When I first started, I said that I would not be able to dramatize this case and I had in mind Mr. McMonagle's show which I have seen many times. * * *
>
> Mrs. Kosowatz, I have the utmost sympathy for them. I come myself from a large, tight family into which tragedy has crept. We were not advised by an eloquent and an emotional advocate to determine what we wanted. We got what we took. Nothing more."

R. 450:

> "Now, if there were any defects, any deficiencies in that car, there are criminal prosecutions which can be made against the railroad, but they do not appear in this petition. * * *
>
> Now, whether or not any of these pictures of the installations for loading and unloading were ever identified, this jury doesn't, nor do I, know, nor does Mr. McMonagle know because there is no evidence on that point."

This statement was untrue. The testimony did identify the installations shown in the pictures which were in evidence.

Plaintiff's Exhibit 19 was identified as the installation of the Erie Railroad Company.

R. 182:

> "Q. Well, Mr. Germain, have you examined the facilities of the Erie Railroad diesel plant for unloading tank cars? * * *
>
> A. They have the platform that I spoke of and the hinged platform to get over onto the top of the tank car."

R. 183:

"Q. Well, what is that a picture of, what installation? (referring to Plaintiff's Exhibit 19).

A. This is the one at the Erie Railroad.

Q. All right. The one you described?

A. On 55th, yes. It's only a few feet from 55th Street. You can see it from the road as you go by."

R. 453:

"But it seems to me that if convenience of Mr. McMonagle's case had required Mr. Phillips to find the dome board on the other side of the car, which, as you all can see, there is none, if it suited his convenience to have it slippery, it would have been slippery."

R. 454:

"Now, Mr. Germain did make some statements about this being a dangerous situation or a hazardous situation. I have no more comment on that except that we have Courts of Appeals that will take care of situations like that where I find myself.

Mr. G. J. McMonagle: Objection, your Honor. Objection.

The Court: Overruled."

R. 455:

"Mr. Cardinal: I merely point out that Mr. McMonagle's witnesses will make statements which are contrary to fact and which are convenient for his purpose."

Prior to the argument (R. 408), Specification of Negligence No. 7 was withdrawn from the jury by counsel for the respondent. In argument, petitioner's counsel had this to say with reference to the withdrawal by Mr. McMonagle:

"That's Specification No. 7. That is an example of what I'm trying to point out that there is absolutely no evidence. He had no evidence. He can say anything in

this and he said anything and he will say anything in argument. Now, he comes in and he attempts, after including this in his opening statement of all of this tripe we are accused of, he comes in and he asks the Court if he can take Page 3 out and leave that out and why? Because even he can see how ridiculous he looks."

R. 460:

"Mr. Germain specifically stayed away, or maybe more correctly, he was told to stay away, from all of the other railroad installations in Cuyahoga County."

R. 461:

"What I would like to convey to the jury is that no matter what would have been convenient for Mr. McMonagle's case, Mr. Phillips would have found it."

R. 462:

"Mr. McMonagle said that he has procured a man who could be relied upon, Mr. Germain. I have spoken about Mr. Germain and I think he is in the same category as Mr. Phillips. We have been admonished, where is our safety engineer? Well, the Interstate Commerce Commission is our safety engineer, the only ones that we can have."

In view of the foregoing, petitioner's counsel can hardly complain about the discussion of the evidence contained in respondent's argument.

There is no occasion for dissecting decisions based upon matters wholly different from those shown by the complete record in this action. Actually the legal contentions of the petitioner are incorrect based on a record as contended by it.

We consider it an understatement to say that there are no special or important reasons to grant the writ herein. Surely, the petitioner is not asking that the Supreme

Court of the United States weigh the evidence in matters such as the instant case.

It is further submitted that the record herein does not reflect any proceedings that would warrant a review of the instant case by the Supreme Court of the United States.

The petition herein did not allege any claim of dependency by anyone other than the widow.

The only evidence of dependency presented in the trial of the case was as to the surviving spouse. Agnes Kosowatz, the respondent, testified at R. 208 that she was the widow of the decedent; that he made his home with her and her daughter Catherine and her children; that her husband supported her; that his earning were about $5000 a year.

At R. 211 she testified that her husband worked regularly most of the time.

The verdict of $25,000 can hardly be said to represent more than the pecuniary interest the widow had in the life of her deceased spouse.

Title 45, U. S. C., Paragraph 51 provides in part:

> "Every common carrier by railroad * * * shall be liable in damages * * * in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * *."

Title 45 U. S. C., Paragraph 59 provides:

> "Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee. * * *"

In a case where there is any dispute as to the question of dependency, the amount recovered for wrongful death is apportioned, in Ohio, by the Probate Court of the county in which the decedent resides. However, an amount re-

covered by the personal representative as a result of injuries suffered by the decedent prior to his death does not require apportionment based upon dependency. With an intestate decedent, the probate proceedings require the designation of the surviving spouse and the listing of the next of kin. The name, therefore, of the surviving spouse and of the next of kin in the petition herein is, therefore, proper and the failure or refusal to emasculate the petition is not prejudically erroneous.

The respondent herein is Agnes Kosowatz, the administratrix and it is difficult to see how an action could be dismissed as to persons who are neither plaintiff nor defendant therein. The Court correctly charged the jury that the recovery in this case is limited to such sum as, under the *circumstances in this case*, will be just compensation for the pecuniary loss suffered by the widow and next of kin because of the death of Joseph Frank Kosowatz.

The only averment as to dependency herein was as to the widow, the only testimony as to dependency was as to the widow, and since the court limited the recovery to such sum, as under the circumstances in this case, would be just compensation for the pecuniary loss suffered, it is ridiculous to contend that the jury went beyond the averments of the petition, the evidence, and the instructions of the court in arriving at its verdict.

It seems to be the contention of the petitioner that the jury erroneously included improper amounts in its verdict. Petitioner fails to point out anything in the record that would indicate this to be the fact. The verdict certainly does not reflect any such situation.

It can not be said, even by taking matters completely out of context, that respondent's counsel engaged in any improper argument inconsistent with the evidence in this

case, even under the stress of heat gendered by the scurrilous and insulting remarks of the petitioner's counsel.

In the second part of Question II (II B), the petitioner seemingly contends that a substantial federal legal question is presented which requires an enunciation of the law applicable thereto by the Supreme Court of the United States for guidance of courts of the nation. Actually, the petitioner is asking in this item that the Supreme Court of the United States weigh the evidence presented to the jury in the trial of this action and determine whether or not the finding of the jury that the decedent did endure pain and suffering between the time he was injured and the time of his death was against the manifest weight of the evidence. It is elementary that this is hardly a function to be performed by this Court. However, there is no error in the trial court's refusal to upset the finding of the jury with respect to the Second Cause of Action of respondent's petition. The facts in this case establish that the decedent was last seen alive at about 11:00 to 11:30 A. M. on February 17, 1958. About 2:00 P. M., his body was found near the pumphouse on No. 7 track in the petitioner's Campbell Road yard. The suffering endured by the decedent following the sustaining of his injuries is obvious from the bloody trail observed by the witnesses.

At R. 107:

There was a large amount of blood on a ladder indicating decedent had fallen; a path of blood established that the decedent was able to arise from the point where he had fallen, stagger alongside of a pumphouse, on a path that was easily followed from the blood he shed along the way, into the pumphouse itself where he bled further and then outside, where his bloody gloves were discovered, then to a spot in the yards where he fell onto his back and bled to death.

When he was found, his nose and mouth were filled with frozen blood.

Conscious pain and suffering prior to his expiration could almost have been measured. The jury allowed very little for such suffering because the amount of its verdict on the Second Cause of Action was for only $1450.00.

CONCLUSION.

The trial of this action before the Cuyahoga County Court of Common Pleas and jury required about two weeks time to complete. In practically every contested case which extends as long as this one did, some harmless error may occur. No prejudicial reversible error occurred in the trial of this case.

Petitioner has had a thorough review of the trial proceedings by both the Cuyahoga County Court of Appeals and the Supreme Court of the State of Ohio.

The petitioner has failed to show that this case presents any novel or unsettled questions of law or any issues of sufficient importance to consume the time of the Supreme Court of the United States. Any further delay in the termination of this lawsuit will result in hardship and injustice to the surviving spouse.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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